LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 4 1958
JOHN T. FEY, Clerk

No. ...706

IN THE

SUPREME COURT OF THE UNITED STATES.

W. HOWES MEADE,
Petitioner,

vs.

C. EDWARD GOLDBERG, etc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

EDWARD F. PRICHARD, JR.,
605 Security Trust Building,
Telephone 2-9937,
Lexington, Kentucky,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	1
Basis of jurisdiction	1
Question presented	2
Summary statement	2
Reasons for granting the petition	3
Appendix A—Order of Court of Appeals—Judgment	5
Appendix B—Opinion and order of District Court	6

Cases Cited.

Crowdus v. Tucker, 9 Ky. Opin. 544	3
First National Bank v. Bickel, 143 Ky. 754, 137 S. W. 780	4

Statutes Cited.

KRS 356.063	4
KRS 356.191	4
KRS 412.110	2, 3
Title 28, U. S. C., Section 1254	1

Rule Cited.

Rule 60 (b)	1, 2

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

W. HOWES MEADE,
Petitioner,

vs.

C. EDWARD GOLDBERG, etc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review a judgment entered by the United States Court of Appeals for the Sixth Circuit on October 26, 1957, affirming an order of the United States District Court for the Eastern District of Kentucky denying petitioner relief under Rule 60 (b) from a judgment for $21,000 previously entered in respondents' favor by the same Court.

The original action was based on diversity of citizenship.

OPINIONS BELOW.

The per curiam opinion of the Court of Appeals is not yet reported but is printed in the appendix to this petition.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Judicial Code, Title 28, U. S. C., Section 1254. The judgment of the Court of Appeals was entered on October 26, 1957. (See Record as certified.)

QUESTION PRESENTED.

Is a defendant in an action upon a promissory note entitled to relief under Rule 60 (b), when said defendant has, pursuant to the provisions of KRS 412.110, required the successful plaintiff to take out execution against a corporate co-defendant, and the plaintiff has failed to do so within ten (10) days thereafter?

SUMMARY STATEMENT.

Respondents filed an action in the District Court to recover from petitioner and from a co-defendant, a Kentucky corporation, certain delinquent installments upon a promissory note. (Joint App., p. 7a, et seq.)

After a trial the District Court entered judgment for respondents on July 27, 1956 (53a). On July 30, 1956, petitioner directed a letter to respondents' counsel requiring respondents to cause execution to be made against the property of Telecception, Inc., the other defendant (60a). Respondents refused to comply with this requirement (70a). Petitioner then filed a motion for relief from Paragraph 2 of the judgment pursuant to Rule 60 (b) (56a).

The District Court denied petitioner's motion and petitioner appealed from the denial. The judgment of the District Court in denying such relief was affirmed by the Court of Appeals.

Petitioner had transferred to Telecception, Inc., the co-defendant, certain assets of an individual proprietorship owned by petitioner for the sum of $91,776.62 (43a). In exchange for these assets the corporation executed two promissory notes, each in the principal amount of $45,888.31 (44a). Petitioner endorsed one of these notes to respondents for a cash consideration and entered into a simultaneous three-party contract personally binding himself that the note would be paid. The other note, as part of the consideration for this contract, was cancelled.

The Kentucky statute under which petitioner sought relief is KRS 412.110, and reads as follows:

> **"Person jointly liable may require suit or execution issued; notice.** A surety, co-obligor, or co-contractor, or one of several defendants to a judgment may, by notice in writing served in person within the state on the creditor or plaintiff, or, if the plaintiff is a nonresident or absent from the place of his residence for the period of thirty days consecutively, upon his agent or his attorney, require him to sue or issue execution. If the creditor does not sue to the next term thereafter at which he can obtain judgment and in good faith prosecute the suit with reasonable diligence, or if the plaintiff does not, within ten days thereafter, sue out execution and in good faith prosecute the collection, the co-surety, co-obligor, co-contractor, or defendant shall be discharged from all liability, except for his proper share according to the then existing condition of the several obligors, contractors, or defendants. In any joint suit against the whole, or separate suit against him, judgment shall be rendered against him separately, and only for such proper share. The written notice required in this section shall not be waived; unless the waiver is in writing. No waiver of the notice shall be pleaded as a defense or given in evidence, unless it is in writing."

REASONS FOR GRANTING THE PETITION.

The Court of Appeals has decided a question of Kentucky law in a manner contrary to the decision of the highest court of Kentucky.

The statute in question has been authoritatively construed by the Court of Appeals of Kentucky in **Crowdus v. Tucker,** 9 Ky. Opin. 544. In that case, certain defendants executed notes to the plaintiffs. After the rendition of judgment, one of the defendants notified the plaintiff's attorney requiring him to sue out execution against the

other defendant. Plaintiff failed to do so and the Court of Appeals of Kentucky held him to be discharged from liability on the judgment for all the notes, except one which the judgment did not cover and on which he was principal obligor.

While the District Court and the Court of Appeals held that petitioner in this case was the principal obligor, such holding is flatly contrary to the Kentucky cases construing the Negotiable Instruments Law, KRS 356.063 and KRS 356.191.

The statute has been construed to bar an admission of parol evidence for purposes of establishing a different liability upon the part of an endorser than that which is stated in the instrument itself. **First National Bank v. Bickel**, 143 Ky. 754, 137 S. W. 780, in which the Court of Appeals of Kentucky stated, with reference to the Negotiable Instruments Law:

> . . . "under it a person who places his signature upon an instrument . . . is deemed to be an indorser, unless he clearly indicates by appropriate words **in the instrument** his intention to be bound in some other capacity . . . The purpose of the statute is to exclude parol evidence, and to make the written instrument control the rights of the parties. The statute fixing the legal effect of the instrument, parol evidence may not be received to give it a different effect."

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit should be granted.

EDWARD F. PRICHARD, JR.,
605 Security Trust Building,
Telephone 2-9937,
Lexington, Kentucky,
Counsel for Petitioner.

APPENDIX A.

ORDER OF COURT OF APPEALS.

Judgment.

"The above cause coming on to be heard on appeal from the judgment of the district court, and on appeal from the order of the district court denying appellant relief from judgment under Section 412.110 of the Kentucky Revised Statutes; and the Court being duly advised,

Now, therefore, it is Ordered, Adjudged and Decreed that the judgment and order appealed from be and are hereby affirmed in accordance with the opinion of Judge Ford and on the findings of fact and conclusions of law of the district court."

APPENDIX B.

OPINION AND ORDER OF DISTRICT COURT.

United States District Court,
Eastern District of Kentucky,
Lexington.

C. Edward Goldberg, Individually, and C. Edward Goldberg, Agent,
Plaintiffs,

vs.

W. Howes Meade and Telecception, Inc., a Corporation,
Defendants.

Order No. 1173.

This cause coming on to be heard upon the motion of the defendant, W. Howes Meade, to relieve him from Paragraph 2 of the Judgment entered herein on July 27, 1956, and the Court having examined the motion, the response of the plaintiffs thereto, and heard arguments of counsel for the defendant, W. Howes Meade, and for the plaintiffs, C. Edward Goldberg et al., finds:

(1) That under the Findings of Fact, Conclusions of Law and the Judgment entered herein, the Court determined and adjudged that the plaintiffs loaned the defendant, W. Howes Meade, the sum of $45,888.31 on June 4, 1954; that the defendant, W. Howes Meade, was personally liable and responsible for the payment of the accrued installments upon the indebtedness, pursuant to the provisions of the Contract, dated June 2, 1954, filed herein; that the defendant, W. Howes Meade, was the principal obligor and primarily responsible and liable for said accrued installments

and that the defendant, W. Howes Meade, did not, nor does he now, occupy the position of a surety or one of secondary liability.

(2) That the application of Section 412.110 of Kentucky Revised Statutes, as construed by the Court, to the facts heretofore determined herein does not effect a discharge of the defendant, W. Howes Meade, from liability, in that said defendant was the principal obligor and primarily liable for the indebtedness adjudicated in Paragraph 2 of the Judgment entered herein and his proper share of said indebtedness was and is the whole thereof.

It is therefore ordered that the motion of the defendant, W. Howes Meade, to relieve him from Paragraph 2 of the Judgment entered herein on July 27, 1956, be, and the same is hereby denied.

It is further ordered that this Order, together with the motion for relief and the plaintiffs' response thereto, be certified by the Clerk of this Court to the United States Court of Appeals for the Sixth Circuit.

.....

Judge.

Dated: January ...., 1957.

The foregoing Order is approved as to form and should be entered.

Gess, Mattingly, Saunier and Atchison,

By .....

813 Citizens Union Bank Building,
Lexington, Kentucky,
Attorneys for Plaintiffs.

E. F. Prichard, Jr.,
Security Trust Building,
Lexington, Kentucky,
Attorney for W. Howes Meade.

No. 706

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

W. HOWES MEADE,
Petitioner,

v.

C. EDWARD GOLDBERG, etc.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEROME J. DICK
607 Ring Building
Washington 6, D. C.
Counsel for Respondents

JACK F. MATTINGLY
WILLIAM B. GESS
Gess, Mattingly, Saunier & Atchison
813 Citizens Union Bank Building
Lexington, Kentucky
GUGGENHEIMER, UNTERMYER & GOODRICH
607 Ring Building
Washington 6, D. C.
Of Counsel for Respondents.

INDEX

	Page
Question Presented	1
Summary Statement	1
Reasons for Denying the Petition	3

Authorities Cited

7 Am. Jur., Bills & Notes Sec. 62	5
Breckenridge County v. Beard, 233 Ky. 823, 27 S.W. 2d 427	5
Crowdus v. Tucker, 9 Ky. Opin. 544	3
Lyons v. Hager's Administrator, 278 Ky. 99, 128 S.W. 2d 196	5
Reynolds Metal Company v. Barker (Ky.), 256 S.W. 2d 17	6
Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70	6
Roberts, Master Commissioner, et al. v. Huddleston, et al., 259 Ky. 595, 82 S.W. 2d 469	6
Thompson, et als v. Fairleigh, et al., 309 Ky. 144, 187 S.W. 2d 812	6
Whitlow v. Whitlow (Ky.), 267 S.W. 2d 739	6

Statutes Cited

K.R.S. 412.110	1, 2

Rules Cited

Rule 60(b) FRCP	1
Supreme Court Rule 19	6

In The

Supreme Court of the United States

October Term, 1957

No. 706

W. Howes Meade,
Petitioner,

v.

C. Edward Goldberg, etc.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

In an action against co-defendants for delinquent installments upon a debt, wherein it is determined that a defendant is the principal obligor and primarily liable for the repayment of a loan, is that defendant entitled to relief from the judgment under Rule 60 (b) when said defendant has attempted to require the successful plaintiffs to take out execution against a co-defendant, under the provisions of K.R.S. 412.110, and the plaintiffs have failed to do so within ten days thereafter?

SUMMARY STATEMENT

In addition to the facts set forth in Petitioner's Summary Statement, respondents believe the additional facts herein set forth will be helpful to the Court in determining whether the subject petition should be granted or denied.

Petitioner requested and obtained a loan of $45,888.31 from respondents. To carry out the mechanics of the transaction Teleception, Inc., co-defendant and dormant corporation of petitioner, was activated. Petitioner endorsed in blank one of the notes received from his corporation payable to his order and delivered it to respondents. Petitioner, Respondents and Teleception, Inc., entered into a written contract providing for the payment of the note in monthly installments of $1,500.00; petitioner personally bound himself to pay the note, represented his net worth to be over $350,000.00, pledged his stock in another corporation and gave powers of attorney to respondents to sell said stock in the event the note should be in default for thirty days. (Joint App., pp. 43a, 44a.)

The transfer of the assets by petitioner to Teleception, the endorsement and delivery of the note, the execution and delivery of the contract and powers of attorney were simultaneous and each the part of one transaction. (Joint App., p. 45a.)

Petitioner, directly or indirectly, paid each of the monthly installments remitted upon the note prior to default, other than the installment payable September 10, 1954, and approximately $500.00 upon another installment. An action was then instituted in the United States District Court of Kentucky and judgment obtained. At the time the action was instituted the note had not matured therein. Petitioner conceded that he was personally liable to respondents for the entire amount of the note on the maturity date but contended that he did not have to pay the installments as they accrued. The note had matured prior to the hearing of the appeal by the Court of Appeals below.

The Kentucky statute under which petitioner sought relief is K.R.S. 412.110, and is set forth at page 3 of petitioner's Petition.

REASONS FOR DENYING THE PETITION.

The matter involved herein is a local transaction involving the petitioner debtor who is trying to avoid his obligation to pay the note evidencing the debt which he owes to the respondents. A cursory examination of the Petition shows:

1. There is no federal question.

2. There is no conflicting decisions by Courts of Appeals for different circuits.

3. The Court below has not decided an important question which conflicts with applicable state law.

4. There is no important state question, the settlement of which is of importance to the public. The Court of Appeals below apparently felt that there was little moment to the issues presented by the petitioner for the Court did not write an opinion but instead merely affirmed the judgment and order appealed from in accordance with the opinion of the District Court Judge.

In view of the above, it is clear that the Petition should be denied.

As stated above the Court of Appeals has not decided a question of Kentucky law in a manner contrary to the decision of the highest court of Kentucky.

Crowdus vs. Tucker, 9 Ky. Opin. 544 (1877), is the only case in which the Court of Appeals of Kentucky has construed the phrase "his proper share" as it appears in K.R.S. 412.110. In this case Crowdus and others executed notes to the plaintiffs. The proof showed that appellant was the principal in all of a $500.00 note, except $100.00 or $115.00. Appellant was surety on the other notes. After judgment appellant notified appellee's attorney requiring him to sue out execution. He failed to do so.

After referring to the statute, the court said:

> "we are of the opinion 'his proper share' means the portion of the debt that he really owes as between himself and his co-sureties, co-obligors, co-contractors and co-defendants. . . ."
>
> "But the notice did not cover the Gartin judgment, and appellant owed as much of the five-hundred dollar claim as was adjudged against him, and therefore as to these two debts the judgment is affirmed."

The District Court, a Kentucky judge long experienced in the interpretation and application of Kentucky statutes and law, and the Court of Appeals having held that petitioner was the principal obligor in all of the debt could not grant petitioner's motion for relief unless they disregarded the interpretation of the statute as construed by the Kentucky Court of Appeals.

The District Court held that petitioner was the principal obligor because:

1. The corporate entity of Telecception, Inc., petitioner's co-defendant, was disregarded and found to be petitioner's alter ego which he was using as a shield against his responsibility for the payment of the obligations due respondents. (Joint App., pp. 33a-35a and 47a.)

2. The terms of the contract and the contemporaneous construction placed thereon by the parties showed it was the intention, understanding and agreement of the parties that petitioner was personally responsible for the payment of the monthly installments. (Joint App., pp. 31a-33a and 48a.)

Either of the foregoing reasons supports the District Court and the Court of Appeals holding that petitioner was the principal obligor. Petitioner does not even contend that the disregard of the corporate entity of the co-defendant, Telecception, Inc., is contrary to Kentucky

law. This fact alone requires a denial of the petition for writ of certiorari.

Petitioner assumes that he can have no liability with respect to the note except as an endorser. He ignores his liability under the contract and powers of attorney executed simultaneously with the note and his endorsement thereof. In Breckenridge County v. Beard, 233 Ky. 823, 27 S.W. 2d 427, the Court of Appeals of Kentucky held, in an action upon two notes, that a separate simultaneously executed contract and parol evidence as to surrounding circumstances were admissible in determining the contract between the parties, saying:

> "It is said that this action was predicated upon promissory notes alone and not upon the written agreement pursuant to which the notes were executed, and that in the absence of fraud or mistake, no evidence of contemporaneous or previous oral declarations or agreements is admissible to contradict the terms of the notes. . . . The principle of those cases cannot be applied in this one, because the basis of the notes was the written subscription, which contained in express terms the conditions upon which the notes were payable. *It is well settled that several separate writings relating to the same subject-matter must be considered together to determine the contract between the parties.* . . ."

The same rule of law is found in 7 Am. Jur., Bills and Notes, Sec. 62, pp. 820-821:

> ". . . it is well settled that a bill or note and a contemporaneous written instrument intended to control the bill or note, made between the same persons, may be read and construed together as if one in form."

In the case of Lyons v. Hager's Administrator, 278 Ky. 99, 128 S.W. 2d 196, the Kentucky Court of Appeals held that the liability of a party to a negotiable instrument may be changed by a contemporaneous written instrument notwithstanding the provisions of the Negotiable Instrument Act.

The contract between the parties was found to be ambiguous and the District Court, in conformity with the decisions of the Kentucky Court of Appeals, admitted parol evidence as an aid in the construction thereof. Whitlow v. Whitlow (Ky.) 267 S.W. 2d 739; Roberts, Master Commissioner, et al. v. Huddleston, et al. 259 Ky. 595, 82 S.W. 2d 469; Reynolds Metal Company v. Barker (Ky.), 256 S.W. 2d 17; and Thompson, et al. v. Fairleigh, et al. 300 Ky. 144, 187 S.W. 2d 812.

This case does not involve an important state question or principles, the settlement of which is of importance to the public, as distinguished from that of parties, and certiorari should be denied. Supreme Court Rule 19; Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U. S. 70.

It is respectfully submitted that the petition for writ of certiorari should be denied.

JEROME J. DICK
607 Ring Building
Washington 6, D. C.
Counsel for Respondents

JACK F. MATTINGLY
WILLIAM B. GESS
Gess, Mattingly, Saunier & Atchison
813 Citizens Union Bank Building
Lexington, Kentucky

GUGGENHEIMER, UNTERMYER & GOODRICH
607 Ring Building
Washington 6, D. C.
Of Counsel for Respondents.